Supreme Court, U.S.
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No. 97-391

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners,*

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, TROY A. ASHMUS, requests leave to proceed in this matter and file a brief in opposition to the petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed before the U.S. District Court. Respondent's affidavit in support of this motion is attached hereto.

DATED: November 4, 1997

Respectfully submitted,

Michael Laurence

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TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, TROY A. ASHMUS, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses that I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No __X__

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

May, 1984 (Salary: approx $4.50 per hour for 30 hours/wk.)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes _____ No __X__

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account (include any funds in prison accounts)?

Yes __X__ No _____

a. If the answer is yes, state the total value of the items owned.

$.39 in inmate trust account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No __X__

If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

TROY A. ASHMUS

SUBSCRIBED AND SWORN TO before me this 18th day of September, 1997.

NOTARY PUBLIC

DENISE NUGENT BULL
Comm. # 1069049
NOTARY PUBLIC - CALIFORNIA
Marin County
My Comm. Expires Aug. 16, 1999

CERTIFICATE

I hereby certify that the respondent, TROY A. ASHMUS, has the sum of $ .39 on account to his credit at San Quentin State Prison, where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution:

None

Dated: 9-18-97

Authorized Officer of the
San Quentin State Prison,

No. 97-391

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the Eleventh Amendment does not bar an action to determine whether the State of California was entitled to the benefits of Chapter 154 where State officials' threats to invoke Chapter 154 deprived habeas petitioners of "their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q)," *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997), and where the State concedes that such a determination could be made in an individual habeas proceeding without offending the Eleventh Amendment?

2. Did the Court of Appeals correctly conclude that State of California may not insist that federal courts limit and expedite consideration of federal constitutional claims in capital cases in accordance with Chapter 154 of Title 28 because it has failed to provide "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel," a conclusion endorsed by the California Legislature's recent enactment of legislation intended to comply with the prerequisites of Chapter 154 and supported by petitioners' repeated concessions during proceedings in the District Court?

3. In effectuating its declaratory judgment, did the District Court properly invoke its inherent authority to enjoin State officials from asserting that the State of California has qualified under the provisions of Chapter 154 and require the parties to this action to litigate the application of Chapter 154 in one forum?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Troy A. Ashmus ("respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by petitioners Arthur Calderon, Teena Farmon, James H. Gomez,[1] and Daniel E. Lungren ("petitioners"). Petitioners have presented no compelling reasons why this Court should review the decision of the United States Court of Appeals for the Ninth Circuit in *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997). *See* Sup. Ct. R. 10.

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[1] Since the filing of the Petition, petitioners have informed the Court and respondent that C.A. Terhune has replaced James Gomez as Director of the California Department of Corrections.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Subsequent to the filing of the Petition, the California Legislature enacted and the Governor of California signed Senate Bill 513 seeking to qualify the State under the optional death penalty provisions contained in Chapter 154 of Title 28. 1997 California S.B. 513 (enacted October 12, 1997). The legislation amends sections 15402 and 15421 of, and adds Chapter 2.1 (commencing with section 68650) to, Title 8 of the California Government Code. The text of Senate Bill 513 is included in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

On April 24, 1996, the procedures for adjudicating federal habeas petitions were substantially altered with the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996). In addition to amending the provisions in Chapter 153 of Title 28, the AEDPA created a new Chapter 154 of the Judiciary Code, codified at 28 U.S.C. sections 2261-2266. Chapter 154 provides for expedited consideration of capital cases in States that provide competent counsel and the resources necessary to develop and present claims in state habeas proceedings. Under the provisions of Chapter 154, a State may "opt-in" to the statutory scheme by establishing a mechanism for the appointment and compensation of counsel in state postconviction or "unitary" proceedings, 28 U.S.C. sections 2261, 2265. If a State complies with these requirements, federal habeas petitions brought by death row inmates are reviewed pursuant to the provisions of Chapter 154 rather than the procedures contained in Chapter 153 of Title 28. The benefits to the State in Chapter 154 include the following provisions:

1. The statute of limitations for filing a first federal petition is 180 days. 28 U.S.C. § 2263(a). Any petition not filed within the limitations period is treated as a second or successive petition, and is therefore subject to the stringent "gatekeeping" provisions for such petitions contained in 28 U.S.C. section 2244(b). 28 U.S.C. § 2262(c).

2. Federal court review of claims for relief is constrained by 28 U.S.C. section 2264, which limits cognizable claims to those that have been "decided on the merits" by the state courts, unless the petitioner meets certain exceptions. 28 U.S.C. § 2264(a).

3. Once the state has filed an answer to the petition, any amendment to the petition filed thereafter is treated as a successor petition. 28 U.S.C. § 2266(b)(3)(B).

4. The process of decision is expedited. The district court has 180 days after the filing of the petition to issue a final decision; of that 180 days, the parties have 120 days to complete all proceedings in the case, including an evidentiary hearing. The court of appeals is required to issue its decision

> within 120 days after the filing of the reply brief. If a court does not meet these deadlines, the state can seek enforcement of the time periods by filing a writ of mandamus in the next highest court. 28 U.S.C. § 2266.

As both the Court of Appeals and the District Court recognized in this case, the Chapter 154 limitations on federal habeas were not intended as arbitrary, Procrustean measures designed solely to truncate federal review and speed executions without regard for the fundamental importance of the writ in safeguarding justice and individual freedom. *Ashmus*, 123 F.3d at 1203-04; *Ashmus v. Calderon*, 935 F. Supp. 1048, 1057-58 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997). Rather, Chapter 154 reflects a sober decision to offer a *quid pro quo* entitling States to demand accelerated federal court procedures in capital cases, but only if the States first have ensured that competent counsel have reasonably prepared each case in state court; otherwise, federal courts would be overwhelmed with the need to factually develop complex issues within a short time frame. *See, e.g., Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (Chapter 154 creates a *quid pro quo* relationship), *cert. denied*, ___ U.S.___, 117 S. Ct. 503 (1996).

Prior to and after the enactment of the AEDPA, petitioners and their agents issued press releases and made numerous public pronouncements in which they repeatedly asserted that California qualified for Chapter 154's benefits. Petitioners vowed to hasten the pace of executions by insisting on enforcement of Chapter 154's provisions. *See, e.g., Ashmus*, 935 F. Supp. at 1056 (petitioners "threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class."); *After the Lull, Bill to Speed Executions Gains Velocity*, SAN FRANCISCO DAILY JOURNAL, Aug. 9, 1995, at 1. Indeed, even after the commencement of this action, petitioners sought selectively to have district courts apply Chapter 154 provisions in pending capital habeas

proceedings.[2] *See, e.g., Ashmus*, 935 F. Supp. at 1056.

In light of petitioners' threats to invoke Chapter 154, respondent commenced this action on April 24, 1996, to resolve whether the State of California was entitled to the benefits of Chapter 154. The complaint alleged that petitioners' threats to invoke Chapter 154 created a climate of confusion and were designed to secure the benefits of Chapter 154 without the State having provided the *quid pro quo* – competent counsel and the resources necessary to develop constitutional claims in state court. Given the need for uniformity in the application of Chapter 154 and because class action habeas corpus petitions are disfavored,[3] this proceeding was filed as a class action pursuant to 42 U.S.C. section 1983 and 28 U.S.C. section 1331 on behalf of the more than 480 inmates on California's death row, more than a third of whom "are without counsel and likely to remain so for some time." *Ashmus*, 935 F. Supp at 1055.[4] Thus, to avoid duplicative litigation, and

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[2] Following the filing of this lawsuit, but before the issuance of a temporary restraining order, petitioners advanced confusing and inconsistent positions regarding Chapter 154 in California habeas proceedings. *See, e.g.*, Exhibits in Support of Reply to Opposition to Application for Temporary Restraining Order and Temporary Declaratory Relief, filed May 1, 1996. In at least one case, petitioners asserted that, not only did Chapter 154 apply, but that the habeas petitioner already was barred from filing a petition by the retroactive application of the six-month statute of limitations. *Kirkpatrick v. Calderon*, CV-96-0351 (C.D. Cal.). Before the district court in this case, petitioners initially advanced the position that Chapter 154 applied to all death row inmates in California, but that the six-month statute of limitations began to run on April 24, 1996, when President Clinton signed the legislation. Petitioners later amended their position to assert that Chapter 154 does not apply to any member of the plaintiff class whose judgment was affirmed by the California Supreme Court prior to June 6, 1989.

[3] *See, e.g., Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987); *see also Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984).

[4] The District Court certified the plaintiff class as those individuals sentenced to death by California courts, except those persons whose convictions and sentences were affirmed prior to June 6, 1989. The class currently numbers approximately 430 members. Of these, approximately 110 persons have invoked the power of the federal courts to review their judgments, approximately 160 persons are before the California Supreme Court awaiting the appointment of counsel for automatic appeal proceedings, and the remainder currently have appellate, habeas, or certiorari proceedings before the California Supreme Court or this Court. In addition, there are approximately

prevent the chaos that would result if this question were raised in every capital habeas case currently in the federal courts in California, respondent sought to resolve, in one forum, the question of whether Chapter 154 applies to California death row inmates.

Recognizing the importance of the issues presented and the irreparable injury that death row inmates faced without a judicial determination of the law governing federal habeas proceedings, the District Court expedited consideration of the procedural and substantive issues in the case, conducted three extensive hearings, and carefully considered the parties' arguments. After thoroughly analyzing the new statute, its application to California, and numerous procedural issues, on June 14, 1996, the District Court issued sixty-three typed pages of factual findings and legal conclusions. The District Court concluded that respondent satisfied all jurisdictional requirements to maintain this action, Chapter 154 does not apply to California death row inmates, and petitioners' threats to invoke its provisions caused irreparable injury to California death row inmates. *Ashmus*, 935 F. Supp. at 1074-75. The District Court issued a declaratory judgment, certified the class, and preliminarily enjoined petitioners from seeking to obtain the benefits of the new provisions. *Id.* at 1075-76.

On appeal, petitioners argued that the District Court's declaratory judgment and injunction violated the State's right to Eleventh Amendment immunity. A divided panel of the Court of Appeals, declining to follow the Fourth Circuit's decision in *Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, No. 97-5623, concluded that respondent's action fell within the exception to Eleventh Amendment immunity articulated by *Ex Parte Young*, 209 U.S. 123 (1908). *Ashmus*, 123 F.3d at 1204-05. The Court of Appeals affirmed the District Court's conclusion that California does not satisfy the prerequisites for application of Chapter 154, as well as the grant of

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fifty persons sentenced to death with cases pending in federal court whose convictions and sentences were affirmed prior to June 6, 1989, and thus are not members of the class.

declaratory and injunctive relief. *Id.* at 1209. Petitioners did not seek rehearing in the Court of Appeals, but rather sought this Court's review to "correct" the appellate court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners insist this Court exercise its plenary review powers to correct the Court of Appeals' "unprecedented encroachment on the Eleventh Amendment" and misapprehension of state law and to resolve the apparent conflict between the Ninth Circuit's and Fourth Circuit's Eleventh Amendment analysis, given the "profound ramifications" posed by such conflict. Petition at 15, 16, 21. Notwithstanding petitioners' hyperbole, the Court of Appeals' decision in this case presents no novel or critical issues worthy of this Court's consideration.

The Ninth Circuit carefully considered petitioner's Eleventh Amendment arguments and found them wanting. Faithfully applying this Court's cases interpreting the *Ex Parte Young* doctrine, the Court of Appeals correctly concluded that the Eleventh Amendment does not bar an action seeking injunctive and declaratory relief to compel state officials to act in conformity with federal law and to protect habeas petitioners' statutory and constitutional rights. This Court need not grant *certiorari* to reaffirm that such circumstances fall squarely within the *Ex Parte Young* exception to the Eleventh Amendment.

Moreover, as petitioners concede, the judicial determination made by the Ninth Circuit is one that may properly be made in individual habeas proceedings without offending the Eleventh Amendment. Far from promoting the interests of State sovereignty, requiring the applicability of Chapter 154 to be resolved in individual habeas corpus proceedings in California would be far more intrusive on the State's sovereignty than the method employed here and a tremendous waste of judicial resources. Such piecemeal litigation in California would potentially result in the State being

haled into federal courts in more than 400 proceedings to determine the same question that has been resolved quickly and efficiently in this proceeding.

Even if this Court were inclined to resolve the apparent conflict with the Fourth Circuit's decision in *Booth v. Maryland*, the Petition contains no justification for reviewing the substantive holding of the Ninth Circuit that the State of California fails to satisfy the requirements of Chapter 154. The Ninth Circuit's interpretations of the requirements of Chapter 154 fully conform to that expressed by every other court addressing the question, and the Petition points to no conflict or interpretation of Chapter 154's prerequisites that warrant this Court's attention. Instead, the Petition requests that this Court wade through a plethora of "introductory statements," "rules," "guidelines," and "policies," to determine whether the State of California qualifies under Chapter 154. Both the District Court and the Court of Appeals painstakenly analyzed the various provisions proffered by petitioner and concluded that California's "mechanism" was wholly deficient to qualify the State as an "opt-in" jurisdiction. Not even the dissent below suggests otherwise. That is no doubt attributable to the fact that the District Court's factual and legal analyses are fully supported by petitioners' repeated concessions of deficiencies in California's purported "mechanism." Indeed, the California Legislature joined the consensus of opinion that these provisions were insufficient when it recently enacted legislation in an attempt to comply with Chapter 154's requirements.

Finally, the scope of the District Court's injunction presents no justification for *certiorari*. The injunction merely prevents petitioners from attempting to obtain the benefits of Chapter 154 unfairly through the use of duplicative litigation and threats. The *quid pro quo* offered by Chapter 154 is a systemic benefit designed to apply, if at all, to a state jurisdiction as a whole. Requiring parties to present their arguments regarding Chapter 154 in one forum and binding the parties to the judicial determination of the application of Chapter 154 in California is neither a novel exercise of

judicial authority nor a reason to invoke this Court's supervisory powers.

I.

CERTIORARI IS UNWARRANTED BECAUSE THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE ELEVENTH AMENDMENT DID NOT BAR THIS ACTION AND BECAUSE ANY CONFLICT WITH THE DECISION IN *BOOTH v. MARYLAND* PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

The Eleventh Amendment generally bars suits against a state in federal court, unless the State has consented or Congress unequivocally has expressed its intent to abrogate the immunity and does so through a valid exercise of power. *Seminole Tribe v. Florida*, ___ U.S.___, 116 S. Ct. 114, 1122-23 (1996). Beginning with the decision in *Ex Parte Young*, 209 U.S. 123 (1908), however, this Court consistently has held that the Eleventh Amendment does not bar equitable suits seeking to prevent state officers from violating federal law or to ensure the supremacy of federal law. Thus, the Eleventh Amendment does not prohibit suits against state officials when "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160). Thus, the *Young* exception permits suits alleging violations of federal statutes, *see, e.g., Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030, 1034 (9th Cir. 1985), and suits to ensure that state officers' conduct "is in compliance with federal law," *Seminole Tribe*, 116 S. Ct. at 1131 n.14; *Natural Resources Defense Council v. Cal. Dept. of Trans.*, 96 F.3d 420, 422 (9th Cir. 1996) (*Young* "would be undermined if state officials were not required to act consistently with federal statutes").

The Court of Appeals applied these principles to determine that the Eleventh Amendment does not bar this action. It first concluded that the *Ex Parte Young* exception applied because the

suit sought prospective relief to ensure compliance with federal law and to protect respondent's federal rights. *Ashmus*, 123 F.3d at 1205 (until the State complies with the opt-in requirements, "it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28"). As the Ninth Circuit concluded:

> The plaintiffs satisfy this requirement. They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements . . . threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q).

Ashmus, 123 F.3d at 1204. In reaching these conclusions, the Court of Appeals relied upon the District Court's extensive -- and unchallenged -- factual findings about the nature and effect of petitioners' conduct. As the District Court found, petitioners' threats to invoke Chapter 154 in future proceedings coupled with the lack of a binding judicial determination of the applicability of Chapter 154 forced habeas petitioners to comply with the provisions, "thus secur[ing] for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits."[5]

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[5] *See also Ashmus*, 935 F. Supp. at 1057 ("Defendants' statements during the course of this litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions."); *id.* at 1056 ("Absent judicial relief from this Court, defendants threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153."); *id.* ("The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights."); *id.* at 1058 ("as a factual matter, the Court finds that defendants' threats have caused plaintiffs to forgo their statutory rights and that, absent relief from this Court, defendants' threats will continue to cause such injury"); *id.* at 1059-60 ("plaintiffs are suffering 'actual' injury because defendants have asserted, and, absent judicial relief, will continue to assert falsely that Chapter 154 governs plaintiffs' ability to file and pursue federal habeas proceedings. Because of the uncertainty created by defendants' assertions, plaintiff Ashmus will be forced to comply with Chapter 154 and to structure his habeas litigation

Ashmus, 935 F. Supp. at 1056. Notably, the Petition before this Court does not mention, let alone address, the District Court's factual findings regarding the effect of petitioners' threats to invoke Chapter 154 on capital habeas petitioners' rights.[6]

The Court of Appeals further concluded that the effect of permitting this litigation would "have little, if any, impact on the State's sovereign interest." *Ashmus*, 123 F.3d at 1205. Noting that a determination of the applicability of Chapter 154 could be made in any habeas proceeding without offending the Eleventh Amendment, the Court concluded that resolving the issue in a single universal action worked no intrusion on the State's sovereignty. As the Court of Appeals noted,

> California is not complaining about being haled into federal court to determine whether it qualifies under Chapter 154. Instead, California argues the appropriate procedure for resolving this dispute is to litigate the issue in each individual habeas proceeding, rather than in this single universal action. Whether the issue is resolved in this action or in separate individual habeas proceedings, California acknowledges the issue will be resolved by a federal court into which it is haled, if not willingly at least resignedly. *Ashmus*, 123 F.3d at 1205.[7]

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accordingly. Other members of the plaintiff class will be similarly affected.").

[6] In a footnote, petitioners raise what they believe to be the Court of Appeals' mistaken factual assumption regarding the harm caused by the uncertain application of Chapter 154. Petition at 19 n.7 (discussing issue of lack of counsel to assist habeas petitioners in filing federal petitions). Although respondent submits that petitioners are misreading the Ninth Circuit's opinion, even if petitioners' complaint were correct, it should have been included in a petition for rehearing in the Court of Appeal and does not form the proper basis for invoking this Court's jurisdiction. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

[7] Indeed, following the decision in *Booth*, petitioners urged the Ninth Circuit to adopt the following procedures: dismiss the instant case; deem the parties in respondent's habeas proceeding to have moved for declaratory judgment based on the pleadings and records in this case; order the district court to rule on the declaratory judgment; if the district court grants declaratory judgment for respondent, the district court's preliminary injunction order "shall be deemed the court's statement of decision and Calderon shall be deemed to have noticed appeal therefrom without further action on his part"; and order "[t]hat the resulting appeal shall be immediately docketed by the Clerk of this Court; that the record in 96-16141 shall be deemed the certified record in said appeal; and that on such record the cause shall be deemed fully briefed, argued, and submitted for decision of the Court." Appellants' Supplemental Responsive Brief at 14-15. Had the Court of Appeals followed petitioners' suggestion, the same panel would have resolved the same legal issues

Although petitioners allude to havoc to the State's sovereignty worked by the Ninth Circuit's decision, they have failed to explain precisely how their sovereign interests are more appreciably affected by this litigation than if petitioners had been forced to respond to motions for declaratory judgment in the approximately 160 habeas cases currently in federal court. Indeed, as the Court of Appeals concluded, "efficiency and fairness" -- interests that are central to the *Ex Parte Young* exception – compelled its conclusion. *Ashmus*, 123 F.2d at 1206. By filing this action, respondent sought a prompt resolution of the applicability of Chapter 154 in a single proceeding that binds all concerned parties. In addition to conserving limited judicial resources, resolving the dispute in this proceeding provided the only forum for the more than 300 persons sentenced to death currently on automatic appeal or in habeas proceedings in state court and for whom no federal habeas proceeding was available. Most important, the resolution of the issues in this case provide certainty, rather than the chaos and confusion that a multiplicity of suits would cause.

Without addressing the basis for the Court of Appeals' decision, petitioners insist that *certiorari* is appropriate because the decision of the Court of Appeals below conflicts with that in *Booth v. Maryland*. In *Booth*, the court held that the Eleventh Amendment bars a suit by five death-row inmates challenging Maryland's compliance with Chapter 154 because there was "no continuing violation of federal law." 112 F.3d at 143. In petitioner's view, these differing applications of the Eleventh Amendment not only conflict, but present an issue of cataclysmic proportions. *See, e.g.*, Petition at 20-21.

Notwithstanding petitioners' dire predictions and any conflict with the *Booth* decision,

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on the same record presented in this case, all without changing the ultimate result or affecting the State's sovereignty. *Certiorari* is simply not warranted to permit the State to engage in its version of judicial musical chairs.

however, there are no compelling reasons justifying the grant of *certiorari* in this case. Although petitioners assert that, as a result of the Ninth Circuit's decision, every litigation position advanced by a state official will be subjected to a lawsuit, the argument is meritless. The Ninth Circuit's Eleventh Amendment holding is extremely narrow and fact-specific: It relies upon the District Court's extensive factual findings about the insidious effect of petitioner's conduct. In addition, it is premised upon a recognition that the Eleventh Amendment presents no bar to a federal court making the same judicial determination regarding the applicability of Chapter 154 in the context of an individual habeas proceeding, as well as the critical need to resolve this issue expeditiously which was created by petitioner's overreaching conduct. Indeed, although petitioners predict that States will be subjected to all sorts of abusive litigation as a result of the decisions of the lower courts in this case, no such litigation has occurred even though this case was filed in April 1996.

II.

CERTIORARI IS UNWARRANTED TO INTERPRET THE REQUIREMENTS OF CHAPTER 154 BECAUSE THE COURT OF APPEALS' INTERPRETATION IS CONSISTENT WITH THAT OF OTHER FEDERAL COURTS.

Petitioners ask this Court to grant certiorari to resolve whether the Court of Appeals erred in determining that California's mechanism for the appointment and compensation of competent counsel does not entitle the state to the benefits enumerated in Chapter 154. Petition at i, 21-27. Although petitioners disagree with the Court of Appeals' interpretation of Chapter 154 and the inadequacy of the California scheme to fulfill the requirements Chapter 154, the Petition identifies no reasons why this Court should exercise its supervisory power. Petitioners can point to no conflict among the lower courts in interpreting the requirements of Chapter 154 because no such conflict exists. Similarly, petitioners are unable to demonstrate any national interest to be served by this

Court reviewing the intricacies of California's various "guidelines," "policies" and "procedures" to determine whether the District Court and Court of Appeals have correctly concluded that this jumble of disparate provisions does not constitute a qualifying "mechanism" under Chapter 154.

In the District Court and on appeal, petitioners asserted that the State of California met the requirements of Chapter 154's because it had established a "unitary review" procedure "by virtue of a 'comprehensive scheme of interlocking cross-implementative provisions.'" *Ashmus*, 935 F. Supp. at 1056.[8] To qualify under a unitary review procedure, the state must

> establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel. 28 U.S.C. § 2265(a).

After analyzing the myriad of provisions cobbled together by petitioners, the Court of Appeals determined that California did not comply with Chapter 154 because (1) its purported standards for competency of counsel in capital cases were not contained in a "rule of court," as required by section 2265(a), and were merely nonbinding recommendations; (2) it does not provide an adequate mechanism for compensating counsel for the investigation and presentation of collateral

[8] In the Court of Appeals, petitioners argued that the following, in combination, constituted a "rule of court of last resort" establishing a mechanism for the appointment, competency, and compensation of counsel in unitary proceedings for purposes of § 2265: (1) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" (hereafter "Rules of Court"); (2) Rule of Court 76.5; (3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council; (4) the California Supreme Court's Statement of Internal Operating Practices and Procedures; (5) the California Supreme Court's Statement of Policies Regarding Cases Arising from Judgments of Death; (6) *In re Clark*, 855 P.2d 279 (Cal. 1993); and (7) California Government Code § 68511.5. *Ashmus*, 123 F.3d at 1207.

The Petition mentions additional provisions not referred to by petitioners in the proceedings below, including: Article 6, § 6 of the California Constitution; California Government Code § 68070; California Rules of Court, Introductory Statement, Court Rules Vol. 12, pt.1 at 4; and California Penal Code § 1241. Petition at 5-8.

habeas claims, because it restricts the investigation of habeas claims to those apparent from the face of the record; and (3) it has made no *bona fide* offer of counsel as required by section 2265(b) because of the backlog of appointments resulting from chronic delays in appointing counsel.[9] *Ashmus*, 123 F.3d at 1207-08.

The Court of Appeals's interpretation of the requirements of Chapter 154 is in harmony with every other court addressing the issue. The federal courts uniformly have interpreted Chapter 154's requirements strictly, as "necessary to meaningfully effectuate the *quid pro quo* arrangement which lies at the core of Chapter 154." *Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996), *rev'd in part on other grounds, sub nom. Satcher v. Pruett*, ___ F.3d ___, 1997 WL 577684 (4th Cir. Sept. 18, 1997); *see also Scott v. Anderson*, 958 F. Supp. 330, 332 (N.D. Ohio 1997) ("the very precise language Congress chose to use in Chapter 154" requires that its provisions be strictly construed). The required mechanism for the appointment and compensation of competent counsel cannot be satisfied by "a loose collection of statutes and regulations," but must be "clear" such that it "can be seen and relied upon by indigent capital defendants." *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996); *Hill v. Butterworth*, 941 F. Supp. 1129, 1143 (N.D. Fla. 1996) ("[A] plain reading of [Chapter 154] indicates that Congress wanted . . . a specific mechanism for competent counsel.").

The mechanism must establish competency standards for counsel in state *collateral* proceedings, *Mills v. Anderson*, 961 F. Supp. 198, 202-03 (S.D. Ohio 1997) (standards of

[9] Respondent presented evidence, and both the district court and court of appeals specifically found that it routinely takes up to four years for the State to appoint counsel in capital cases and, as a result, approximately a quarter of the class members had not yet been appointed counsel at the time the preliminary injunction was entered. *Ashmus*, 123 F3d at 1208. Currently, approximately a third of the class members have not had unitary counsel appointed to represent them. *See supra* note 4.

competence for representation at trial or on direct appeal inadequate), *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996), *rev'd in part on other grounds*, ___ F.3d ___, 1997 WP 612739 (5th Cir. Oct. 3, 1997), and these standards must be "explicit," "specific" and "mandatory." *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in other part*, 105 F.3d 209 (5th Cir. 1997); *Wright v. Angelone*, 944 F. Supp. at 468 (Chapter 154 requires "binding enforcement mechanisms"). In addition, there must be a "formal, institutionalized commitment to payment of counsel and litigation expenses" in the litigation of collateral claims. *Satcher v. Netherland*, 944 F. Supp. at 1242.

Finally, the state must make a "meaningful" offer of counsel to capital prisoners; a backlog of unrepresented prisoners demonstrates that a state does not have a mechanism for appointment that complies with Chapter 154. *Hill v. Butterworth*, 941 F. Supp. at 1147. The failure of a state to meet *any one* of these criteria, or any of the other requirements enumerated in the statute, requires that it not obtain the benefits of Chapter 154. *Satcher v. Netherland*, 944 F. Supp. at 1240; *Hill v. Butterworth*, 941 F. Supp. at 1147. Applying these criteria, federal courts uniformly have concluded that no State qualifies for the benefits of Chapter 154.[10]

The Court of Appeals' conclusion that the State of California's failure to have an enforceable rule of court as required by Chapter 154 fully comports with other courts' interpretation of the provision. The lower federal courts unanimously agree concur that a State fails to meet Chapter

[10] *See Austin v. Bell*, ___ F.3d ___ n.3, 1997 WL 602670 (6th Cir. Oct. 2, 1997) (*affirming Austin v. Bell*, 927 F. Supp. 1058, 1061-62 (M.D. Tenn. 1996); *Langford v. Day*, 110 F.3d 1380, 1386 n.2 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 208 (1997) (Montana); *Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35-36 (3rd Cir. 1997) (Pennsylvania); *Mata v. Johnson*, 99 F.3d at 1267 (Texas); *Burris v. Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (en banc) (Indiana); *Mills v. Anderson*, 961 F. Supp. 198 (S.D. Ohio 1997); *Scott v. Anderson*, 958 F. Supp. 330, 331-32 (N.D. Ohio 1997); *Thomas v. Gramley*, 951 F. Supp. 1338, 1341 n.3 (N.D.Ill. 1996); *Hamblin v. Anderson*, 947 F. Supp. 1179 (N.D.Ohio 1996); *Satcher v. Netherland*, 944 F. Supp. at 1222; *Wright v. Angelone*, 944 F. Supp. at 460; *Williams v. Cain*, 942 F. Supp. at 1092; *Hill v. Butterworth*, 941 F. Supp. at 1140-41; *Zuern v. Tate*, 938 F. Supp. 468 470-72 (S.D.Ohio 1996); *Leavitt v. Arave*, 927 F. Supp. 394, 396 (D.Idaho 1996).

154's requirements if its mechanism for the appointment and compensation of competent counsel is not established by statute or "rule of court" as required by §§ 2261 and 2265. *See Mata v. Johnson*, 99 F.3d at 1267; *Mills v. Anderson*, 961 F. Supp. at 203; *Hill v. Butterworth*, 941 F. Supp. at 1143; *Zuern v. Tate*, 938 F. Supp. at 471. In addition, the lower courts have uniformly rejected petitioners' assertion, Petition at 23, that "binding or mandatory" standards are not required by Chapter 154. *See Mata v. Johnson*, 99 F.3d at 1267 (rejecting state's argument that a "flexible mechanism" qualifies under Chapter 154, because "specific, mandatory standards" are required); *Satcher v. Netherland*, 944 F. Supp. at 1242 ("If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance . . . it could have done so. However, it elected not to do so."); *Wright v. Angelone*, 944 F. Supp. at 468 (Chapter 154 requires "binding enforcement mechanisms"); *Zuern v. Tate*, 938 F. Supp. at 472 ("Congress did not write [Chapter 154] in terms of substantial compliance. Rather the section is replete with mandatory language."); *Hill v. Butterworth*, 941 F. Supp. at 1143 ("A plain reading of [Chapter 154] indicated that Congress wanted something more than general supervision [of capital counsel by] a state high court.").

Similarly, the conclusion of the courts below that California's "offer" of counsel does not satisfy the requirements of Chapter 154 because there is often a four-year delay following a prisoner's acceptance of the state's "offer" before counsel is appointed is consistent with that reached by the only other federal court confronted with the issue. *Hill v. Butterworth*, 941 F. Supp. at 1146-47.[11] Petitioner do not and cannot cite any authority suggesting Congress meant that a state may

[11] Petitioners' suggestion that Chapter 154's requirement that the state actually appoint counsel "upon" the prisoner's acceptance of an offer of counsel, § 2261, "imposes no time condition," Petition at 26, is simply not the case. The failure of Congress to define terms implies a Congressional intent that the words have their established meaning at the time the act was passed. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). Dictionary definitions are

subject death-row prisoners to up to four years of delay in appointing counsel and yet still qualify for the extremely expedited review benefits of Chapter 154.

Indeed, the California Legislature -- in an apparent concession that the provisions cited by petitioners are insufficient to qualify under Chapter 154 -- recently enacted legislation in an effort to comply with Chapter 154's requirements. Following the decision of the court of appeals in this case, and after the Petition was filed in this Court, the State of California passed 1997 California S.B. 513 (enacted Oct. 12, 1997). Senate Bill 513 creates the California Habeas Resource Center, which is to employ 30 attorneys "to represent any person convicted and sentenced to death in this state, . . . for the purpose of instituting and prosecuting postconviction actions in the state and federal courts." S.B. 513 also requires the California Judicial Council and California Supreme Court "to adopt rules of court setting competency standards for appointed counsel in death penalty appeals and habeas corpus proceedings," and authorizes the Supreme Court to compensate counsel at a higher hourly rate, as well as increase the limit on investigative funds. *Id.*

The language of Senate Bill 513 is remarkably similar to that contained in Chapter 154. For example, the legislation creates California Government Code §§ 68652 and 68653, which bear a striking resemblance to the procedures for appointment described in 28 U.S.C. § 2261(c). New California Government Code §§ 68652 and 68653 state:

> **68652.** The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in state postconviction proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.
>
> **68653.** No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests [sic] continued representation.

Given its timing and content, it cannot be doubted that Senate Bill 513 was enacted in an attempt to comply with the requirements of Chapter 154. Accordingly, despite its protestations to the contrary in this proceeding, California has conceded the clarity of Chapter 154's requirements, and that it has not in the past met the prerequisites for the competence and compensation of counsel contained in Chapter 154. This Court need not grant *certiorari* to interpret federal law where it is apparent that no question regarding its interpretation remains.

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a source used to uncover the settled meaning of statutory language. *See M.C.I. Telecommunications Corp. v. A.T. & T.*, 512 U.S. 218, 225 (1994). Dictionaries define the word "upon," when used as a preposition, as interchangeable with the word "on"; the preposition "on" when used in a temporal sense, means "at the time of." *See, e.g.*, Webster's New World Dictionary 419, 656. Therefore, in requiring the appointment of counsel "upon" the prisoner's acceptance, Congress intended that states be required to appoint counsel "at the time of" the prisoner's acceptance.

III.

THE DISTRICT COURT PROPERLY INVOKED ITS INHERENT POWER TO ENJOIN LITIGANTS FROM RELITIGATING AN EXISTING JUDGMENT IN OTHER COURTS

Despite their ability to present their arguments concerning Chapter 154's applicability in voluminous briefing before the District Court and the Court of Appeals, and now this Court, petitioners assert their right to Due Process of Law and right of access to the courts have been violated. Petition at 30. The First and Fourteenth amendments, however, do no require that litigants against whom a valid judgment has been entered be allowed to circumvent that judgment by relitigating the issues in other fora. There is no constitutional right to forum shop in the hopes of creating divergent decisions. Rather, federal courts have long had the power to enjoin litigants from

circumventing court orders.

The All Writs Act, 28 U.S.C. section 1651(a) authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977), this Court explained that the Act authorizes federal courts to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." This power extends to "persons who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 174 (internal citations omitted).

Where a litigant's actions in other court proceedings threaten to frustrate the judgment entered by a federal court, the federal court may utilize the All Writs Act to issue orders enjoining litigants from pursuing other court action that would conflict with the court's judgment. *See White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994) (federal court enjoined related actions pursued in other *fora*), *cert. denied*, 515 U.S. 1137 (1995); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (All Writs Act permits a district court to enjoin actions in [other fora] "where necessary to prevent relitigation of the existing federal judgment."); *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir.1980) (district court had the power to enjoin "any future litigation on any cause of action arising from the fact situation at issue in [the] case."); *In the Matter of VMS Securities Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996) (affirming district court's use of the All Writs Act "to prevent litigants from frustrating or circumventing its orders"); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984) ("a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive

relitigation"). Such injunctions do not violate the First Amendment. "Rules of procedure frequently force litigants into courts not of their choosing, but due process and the First Amendment require only that an impartial forum be available to litigants, and not that the doors of every courtroom in the land be open to them." *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987). Petitioners can make no showing that the District Court provided an inadequate forum for resolution of the applicability of Chapter 154 in California.

CONCLUSION

The District Court conducted an exhaustive inquiry into the issues in this case and resolved those issues in extensive factual findings and legal conclusions. Similarly, the Court of Appeals examined the extensive record in this case and a majority concluded that petitioner's arguments were meritless. Petitioners have failed to establish grounds for this Court to review the circuit court's decision. The petition for *certiorari* to review the judgment of the Court of Appeals should be denied.

DATED: November 4, 1997

Respectfully submitted,

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APPENDIX

1997 California Senate Bill No. 513, California 1997-98 Regular Session
Enacted: October 12, 1997

An act to amend Sections 15402 and 15421 of, and to add Chapter 2.1 (commencing with Section 68650) to Title 8 of, the Government Code, relating to appellate representation.

LEGISLATIVE COUNSEL'S DIGEST

SB 513, Lockyer. Appellate Representation: State Public Defender: California Habeas Resource Center.

Existing law establishes the Office of the State Public Defender, as specified, and specifies the powers and duties of that office. It also authorizes the Supreme Court to appoint and employ specified personnel, including phonographic reporters, assistants, secretaries, librarians, and bailiffs.

This bill would revise the existing authorization for representation by the State Public Defender to authorize the State Public Defender to represent any person financially unable to employ appellate counsel in capital cases, and in specified noncapital appeals; and to hire additional counsel and support staff, as specified. The bill would also create the California Habeas Resource Center in the judicial branch of state government, specify its powers and duties, and provide for an executive director and board of directors, appointed as specified. The bill would also require the Judicial Council and the Supreme Court to adopt rules of court setting competency standards for appointed counsel in death penalty appeals and habeas corpus proceedings; and authorize the Supreme Court to compensate appointed counsel in death penalty appeals and postconviction proceedings at a rate of at least $125 per hour, as specified, and to raise the limit on investigative and other expenses for such counsel, as specified, to $25,000 without an order to show cause.

TEXT:

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 15402 of the Government Code is amended to read:

15402. The State Public Defender may employ deputies and other employees, and establish and operate offices, as he or she may need for the proper performance of his or her duties. The State Public Defender may contract with county public defenders, private attorneys, and nonprofit corporations organized to furnish legal services to persons who are not financially able to employ counsel and pay a reasonable sum for those services pursuant to the contracts. He or she may provide for participation by those attorneys and organizations in his or her representation of eligible persons. The attorneys and organizations shall serve under the supervision and control of the State Public Defender and shall be compensated for their services either under those contracts or in the

manner provided in Section 1241 of the Penal Code.

The State Public Defender may also enter into reciprocal or mutual assistance agreements with the board of supervisors of one or more counties to provide for exchange of personnel for the purposes set forth in Section 27707.1.

The office of the State Public Defender may hire 15 additional staff attorneys and the support staff necessary for proper implementation of Section 15421.

SEC. 2. Section 15421 of the Government Code is amended to read:

15421. Upon appointment by the court or upon the request of the person involved the State Public Defender is authorized to represent any person who is not financially able to employ counsel in the following matters:

(a) An automatic appeal to the Supreme Court under Section 11 of Article VI of the California Constitution and subdivision (b) of Section 1239 of the Penal Code.

(b) A petition for a writ of certiorari to the United States Supreme Court with respect to a judgment on the automatic appeal to the Supreme Court under Section 11 of Article VI of the California Constitution and subdivision (b) of Section 1239 of the Penal Code.

(c) An appeal in a noncapital, criminal case as long as the State Public Defender is fulfilling the responsibilities to provide representation imposed pursuant to subdivisions (a) and (b), or the State Public Defender determines that taking a limited number of those cases is necessary for staff training.

SEC. 3. Chapter 2.1 (commencing with Section 68650) is added to Title 8 of the Government Code, to read:

CHAPTER 2.1. CALIFORNIA HABEAS RESOURCE CENTER

68650. As used in this chapter, "center" means the California Habeas Resource Center, and "board" means the board of directors of the center.

68651. There is hereby created in the judicial branch of state government the California Habeas Resource Center, which shall have all of the following general powers and duties:

(a) To employ up to 30 attorneys who may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state, who is without counsel and who is determined by a court of competent jurisdiction to be indigent, for the purpose of instituting and prosecuting postconviction actions in the state and federal courts, challenging the legality of the judgment or sentence imposed against that person, and preparing petitions for executive clemency. Any such appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution.

(b) To file motions seeking compensation for representation and reimbursement for expenses pursuant to Section 3006A of Title 18 of the United States Code when providing representation to indigent persons in the federal courts, and transmit those payments to the treasurer for deposit in a special account in the General Fund which, upon appropriation, shall be available for the purposes of the center.

(c) To work with the Supreme Court in recruiting members of the private bar to accept death penalty habeas case appointments.

(d) To establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings in capital cases.

(e) To establish and periodically update a roster of experienced investigators and experts who are qualified to assist counsel in postconviction proceedings in capital cases.

(f) To employ investigators and experts as staff to provide services to appointed counsel upon request of counsel, provided that where the provision of those services is to private counsel under appointment by the Supreme Court, those services shall be pursuant to contract between appointed counsel and the center.

(g) To provide legal or other advice or, to the extent not otherwise available, any other assistance to appointed counsel in postconviction proceedings as is appropriate where not prohibited by law.

(h) To develop a brief bank of pleadings and related materials on significant, recurring issues which arise in postconviction proceedings in capital cases and to make those briefs available to appointed counsel.

(i) To evaluate cases and recommend assignment by the court of appropriate attorneys.

(j) To provide assistance and case progress monitoring as needed.

(k) To timely review case billings and recommend compensation of members of the private bar to the court.

(l) The center shall annually report to the Legislature, the Governor, and the Supreme Court on the status of the appointment of counsel for indigent prisoners in postconviction capital cases, and on the operations of the office. On or before January 1, 2000, the office of the Legislative Analyst shall evaluate the available reports.

68652. The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

(a) The appointment of one or more counsel to represent the prisoner in postconviction state

proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

(c) The denial to appoint counsel upon a finding that the person is not indigent.

68653. No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests continued representation.

68654. (a) The center shall be managed by an executive director who shall be responsible for the day-to-day operations of the center.

(b) The executive director shall be chosen by a five-member board of directors and confirmed by the Senate. Each Appellate Project shall appoint one board member, all of whom shall be attorneys. However, no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board. The executive director shall serve at the will of the board.

(c) Each member of the board shall be appointed to serve a four-year term, and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation, but shall be reimbursed for all reasonable and necessary expenses incidental to their duties. The first members of the board shall be appointed no later than February 1, 1998.

(d) The executive director shall meet the appointment qualifications of the State Public Defender as specified in Section 15400.

(e) The executive director shall receive the salary that shall be specified for the executive director in Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2.

68655. The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

68656. (a) The Supreme Court may compensate counsel representing indigent defendants in automatic appeals arising out of a judgment of death or for state postconviction proceedings in those cases, at a rate of at least one hundred twenty-five dollars ($125) per allowable hour, as defined by the court's Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants. However, nothing in this section is intended to prohibit the hiring of counsel under a flat-fee arrangement.

(b) The Supreme Court may raise the guideline limitation on investigative and other expenses

allowable for counsel to adequately investigate and present collateral claims to up to twenty-five thousand dollars ($25,000) without an order to show cause.

(c) It is the intent of the Legislature that payments to appointed counsel be made within 60 days of submission of a billing.